FILE COPY

Office Supreme Court,
FILED
OCT 24 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 377

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Petitioner,

vs.

RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, PROFESSIONAL INSURANCE CORPORATION, BANKERS LIFE AND CASUALTY COMPANY, AND J. EDWIN LARSON,

Respondents.

BRIEF ON BEHALF OF RESPONDENT BANKERS LIFE AND CASUALTY COMPANY IN OPPOSITION TO BRIEF OF EUGENE COOK, ATTORNEY GENERAL, ON BEHALF OF THE STATE OF GEORGIA.

CHARLES F. SHORT, JR.,
111 W. Washington Street,
Chicago 2, Illinois,

MILLER WALTON,
916 Alfred I. duPont Building,
Miami 32, Florida,

Attorneys for Respondent, Bankers Life and Casualty Company.

THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

Cases Cited.

	PAGE
Ford Motor Company v. Treasury Dept., 323 U. S. 459	3
Kennecott Copper Co. v. State Tax Commission, 327 U. S. 573	3
Middletown N. Bank v. Toledo A. A. & N. M. R. R. Co., 197 U. S. 394	2, 3
Northern Life Ins. Co. v. Read, 322 U. S. 47	3
Shriver v. Woodbine Savings Bank, 285 U. S. 467	2

Statutes Cited.

Ga. Code, § 89-420	2

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 377.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Petitioner,

vs.

RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, PROFESSIONAL INSURANCE CORPORATION, BANKERS LIFE AND CASUALTY COMPANY, AND J. EDWIN LARSON,

Respondents.

BRIEF ON BEHALF OF RESPONDENT BANKERS LIFE AND CASUALTY COMPANY IN OPPOSITION TO BRIEF OF EUGENE COOK, ATTORNEY GENERAL, ON BEHALF OF THE STATE OF GEORGIA.

The Brief of the Attorney General for the State of Georgia purports to be filed under Supreme Court Rule 27-D. No authority is found in that Rule for the Brief. Indeed even the Rule authorizing states to file "amicus" briefs, Rule 42, is not in point. The State of Georgia is not a party in interest, nor is its Insurance Commissioner. As the case now stands, and as is evident from the Attorney

General's Brief, the sole connection of this case with the State of Georgia is that the Hartford Accident and Indemnity Company is sued herein as the surety of a Georgia citizen, Zack D. Cravey. If Cravey was a party hereto, he would be individually liable. The Attorney General, in fact and in effect, is appearing as a sponsor of private interests, to-wit: Hartford Accident and Indemnity Company.

It is elementary law that an intervenor or amicus curiae takes a case as it exists at the time of intervention. It should be noted that if any "default" as charged by the Attorney General (Brief, page 2) has occurred in the presentation of a defense, this Court should not be requested to decide that which has not been preserved as a defense.

If the Attorney General's Brief is merely cumulative, then no reason for entertaining the arguments exists.

On the merits, the Attorney General has not sought to present an objective analysis of Georgia law. The claim is first advanced that the bond does not authorize suit by third persons. To establish this, the bond itself is set forth *in haec verba*. What the Attorney General does not disclose in this connection is that the applicable Georgia statutes do authorize suit directly against the surety on the type of bond herein involved. (Georgia Code, § 89-420, set forth, page 4, Attorney General's Brief.)

Squarely opposed to the inferences sought to be drawn in his first point, is the second point: that a statutory remedy is involved and that, somehow, Respondent Bankers Life & Casualty Company has not followed the statute. It should be made clear that this Respondent is not charged with failure to follow any statutory restrictions upon the exercise of its right to sue such as were involved in the case cited by the Attorney General, *Middletown N. Bank* v. *Toledo A. A. & N. M. RR. Co.*, 197 U. S. 394.

Instead, as it turns out, this Respondent is charged with selection of the wrong forum. This despite the concession that the Georgia statute provides that suit may be brought "in any court having jurisdiction." The Attorney General with absolutely no legal authority would have this Court interpolate "in any court in Georgia" in place of the embracive language of the statute. *Shriver v. Woodbine Savings Bank*, 285 U. S. 467, cited by the Attorney General is not an authority helpful to his argument. That case, in conformity with *Middletown Bank* v. *Railway Co.*, 197 U. S. 394, holds that where a statute creates a liability and "a remedy specially adapted to its enforcement other less appropriate common-law remedies are implicitly excluded." (p. 478.)

There is nothing in that case nor is there any Georgia case which limits the jurisdiction in the manner suggested by the Attorney General.

The footnote suggestion that the fiscal position of the State of Georgia is somehow here involved is devoid of merit. *Northern Life Ins. Co.* v. *Read*, 322 U. S. 47; *Ford Motor Company* v. *Treasury Dept.*, 323 U. S. 459; and *Kennecott Copper Co.* v. *State Tax Commissioner*, 327 U. S. 573, all turn on whether an individual or the State is the party in interest. In each case, the State was held to be the party in interest, not suable in Federal courts without a clear declaration of consent. The instant case does not involve the State as a party in interest.

The last bid of the Attorney General for this Court's interest is the claim that the bond and the statute authorizing recovery thereon do not provide for recovery in this suit under the construction of the Court of Appeals. The Court of Appeals said nothing with reference to this being a suit "for personal dereliction beyond the duties of the office." That a conspiracy is beyond the authority of the offices involved is, of course, true. That the activities in entering

into and pursuing the conspiracy were under color of office is also true. This is not a case where the actions complained of had nothing to do with official duties. Indeed the wrongs complained of were only possible because of the abuse of a public trust.

Georgia has seen fit to insure the public rectitude of its officials by permitting suit against them and their sureties by individuals injured by perversions of official duty. Whether this policy is or is not a wise policy may be open to question but it is certainly in square opposition to the claim that the Federal and State Courts will enforce an immunity from civil suit on behalf of state officials. To do so in this case would frustrate the supremacy of Federal law and would undermine the policy of Georgia as expressed by that division of its government charged with responsibility in the premises, the legislature of that State.

All of which is respectfully submitted,

CHARLES F. SHORT, JR.,
MILLER WALTON,
Attorneys for Respondent, Bankers Life and Casualty Company.